UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

June 4, 1997

NGOZI J. NWANA, Complainant	)	
	)	8 U.S.C. 1324b Proceeding
vs.	)	
	)	OCAHO Case No. 97B00020
THE EQUITABLE LIFE ASSURANCE SOCIETY, Respondent	)	

ORDER GRANTING IN PART AND DENYING IN PART
RESPONDENT'S MOTION TO DISMISS

I. Background

On August 7, 1996, Ngozi J. Nwana (Ms. Nwana or complainant), who described herself as a Nigerian national as well as a legal resident of the United States, filed a charge of discrimination with this Department's Office of Special Counsel (OSC). In her charge, she alleged that on or about December 12, 1995, in response to a newspaper advertisement placed by Equitable Life Assurance Society of the United States (respondent or Equitable) concerning a sales agent position, she submitted an employment resume to a wholly-owned subsidiary of the respondent insurer.

Beginning in late December, 1995, according to the four (4)-page affidavit which Ms. Nwana provided to OSC as part of her charge of discrimination, she was granted four (4) interviews with several of respondent's employees. At the last of those meetings, she stated that congratulations were extended and she reportedly was informed that she had been "hired". She was also apparently required to acquire a license of some type and a schedule of study for the required licensing examination was established, according to her affidavit. On March 1, 1996, her relationship with respondent firm changed markedly and she was terminated on that date. Complainant alleged in her OSC charge that she had been terminated solely because of her national origin and citizenship status.

On September 12, 1996, following its investigation of complainant's August 7, 1996 charge of discrimination based upon her national origin and citizenship status, OSC forwarded a determination letter to complainant's counsel of record. In that correspondence OSC advised that its investigation had failed to disclose sufficient evidence of reasonable cause to believe that Ms. Nwana had been discriminated against by respondent because of her citizenship status. In that

letter, also, OSC informed Ms. Nwana's counsel of record that complainant's charge of national origin could not be entertained, either, because it lacked subject matter jurisdiction over that charge owing to the size of respondent's workforce namely, that the respondent insurer employed in excess of 14 persons at all times relevant.

For those reasons, OSC advised that it would not file a complaint with an Administrative Law Judge assigned to this Office, as Ms. Nwana had requested, and she was instructed that she could file a private action with this Office if she did so on a timely basis.

In addition, OSC informed Ms. Nwana in the determination letter that "your charge has been referred to the Equal Employment Opportunity Commission (EEOC) in order for that office to investigate it under other laws," and for her future possible use she was given the address and telephone number of the New York District Office of EEOC, presumably in furtherance of her claim of national origin discrimination.

On November 12, 1996, Ms. Nwana filed the Complaint at issue against Equitable with this Office, realleging that on or about March 1, 1996, the respondent committed an unfair immigration-related employment practice by having discharged her from employment because of her Nigerian national origin, as well as her citizenship status.

Complainant alleges that in having done so, respondent violated the pertinent provisions of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b(a). Complainant seeks an order that she be rehired to her former position.

On December 16, 1996, in accordance with Equitable's request, the undersigned issued an order granting the respondent until January 22, 1997 to file an answer. Respondent filed an untimely answer on January 27, 1997, some five (5) days late, but since there is no evidence that complainant has been prejudiced by that late filing, no sanctions are being imposed for that breach of the rules.

On January 27, 1997, respondent filed a pleading captioned Notice of Motion to Dismiss, seeking a dismissal of the Complaint for failure to state a claim upon which relief can be granted pursuant to 28 C.F.R. § 68.10 (1996).

On February 12, 1997, complainant filed her response to that dispositive motion, together with a memorandum of law.

For the following reasons, respondent's motion to dismiss is being granted as to that portion of the Complaint alleging national origin discrimination and denied as to that which alleges citizenship status discrimination.

II. Discussion

On January 27, 1997, as previously noted, respondent filed a Motion to Dismiss based upon complainant's having failed to state a claim upon which relief can be granted. The pertinent procedural rule authorizes the Administrative Law Judge to dispose of cases, as appropriate, based upon that ground.

However, when matters outside the pleadings are presented and considered by the Administrative Law Judge, a motion to dismiss is treated as one for summary decision under section 68.38(c). See, e.g., Toussaint v. Tekwood Associated, Inc., 6 OCAHO 892, at 5 (1996); Wiesner v. CIT Tours, Inc., 5 OCAHO 773, at 5 (1995); Fed. R. Civ. P. 12(c). Since both parties have presented and referred to matters outside the pleadings, respondent's motion will be evaluated using those standards applicable to motions for summary decision.

Because the OCAHO summary decision rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in Federal court cases, it has been held that case law interpreting Rule 56(c) is instructive in determining whether summary decision under section 68.38 is appropriate in proceedings before OCAHO. Alvarez v. Interstate Highway Construction, 3 OCAHO 430, at 17 (1992).

As to materiality, only disputes over facts which might affect the outcome of the suit under the governing law will properly preclude the entry of summary decision. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co. V. Zenith Radio, 475 U.S. 574 (1986); U.S. v. Lamont St. Grill, 3 OCAHO 442, at 9 (1990).

One of the principal purposes of the summary decision rule is that of isolating and disposing of factually unsupported claims or defenses. However, a party seeking summary decision always bears the initial responsibility of furnishing the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrates the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

Once the movant has carried that burden, the party opposing the motion must come forward with "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); Anderson, 477 U.S. at 250.

Utilizing those standards, consideration of respondent's Motion to Dismiss is in order.

A. National Origin Claim

Administrative Law Judges assigned to OCAHO have limited subject matter jurisdiction over claims based upon national origin discrimination, since IRCA statutorily limits those claims to employers employing more than three (3) and less than 15 persons. See 8 U.S.C. § 1324b(a)(2); Bent v. Brotman Medical Center, 5 OCAHO 764, at 3 (1995). Therefore, any employer having more than 14 employees is excluded from IRCA coverage with respect to national origin claims, and all claims of that type must be filed with the Equal Employment Opportunity Commission (EEOC).

Respondent advises that complainant previously filed a charge against respondent with EEOC on or about August 7, 1996, based upon the same facts of violation as alleged in the Complaint and has provided a copy of that charge, properly authenticated in the affidavit of Jill C. Rafaloff, respondent's counsel. Respondent also alleges that it employs more than 14 persons, thus effectively denying this Office subject matter jurisdiction over that portion of the Complaint.

Complainant concedes that OCAHO lacks jurisdiction over her national origin claim because the respondent business employs more than 15 employees, see complainant's memorandum of law in opposition, filed February 12, 1997, at 9, and that she has already filed such a charge with EEOC, which is pending.

Accordingly, respondent's Motion to Dismiss is granted as it pertains to that part of complainant's November 12, 1996 Complaint which alleges discrimination based upon her Nigerian national origin.

B. Citizenship Status Claim

Complainant's second and remaining charge will now be examined, that of Equitable's having allegedly discriminated against her based upon her citizenship status.

As a threshold matter, jurisdiction over a claim of citizenship status discrimination only extends to employers of four (4) or more employees. 8 U.S.C. § 1324b(a)(2)(A). It is undisputed that at the time of the alleged discriminatory conduct, the Equitable employed and continues to employ more than four (4) employees, and is therefore covered by IRCA.

Before proceeding, it is also necessary to determine whether complainant has the requisite standing to assert a citizenship status discrimination claim under § 1324b, i.e., whether she is a "protected individual," as that term is defined in the provisions of 8 U.S.C. § 1324b(a)(3):

> (3) Definition of Protected Individual. - As used in paragraph (1), the term "protected individual" means an individual who-
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> (A) is a citizen or national of the United States, or
>
> (B) is an alien who is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence under section 210(a), 210A(a), or 245A(a)(1), is admitted as a refugee under section 207, or is granted asylum under section 208; but does not include (i) an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization or, if later, within six months after the date of the enactment of this section and (ii) an alien who has applied on a timely basis, but has not been naturalized as a citizen within 2 years after the date of the application, unless the alien can establish that the alien is actively pursuing naturalization, except that time consumed in the Service's processing the application shall not be counted toward the 2-year period.

Thus, the burden is on complainant to demonstrate that she is a "protected individual." Ms. Nwana has inconsistently described herself as both a United States and Nigerian national. Although Equitable has not provided evidence on this issue, without a more complete factual record, a finding cannot be made. To assist in determining that potentially dispositive fact, an appropriate Order of Inquiry, directed to Ms. Nwana, will be issued shortly.

Respondent has made two substantive arguments in support of its Motion to Dismiss: (1) that complainant was an independent contractor rather than an employee at the time of the alleged discrimination and therefore was not protected by IRCA's provisions and (2) that Ms. Nwana had been discharged for legitimate business reasons and not for an impermissible discriminatory purpose, as she contends.

Section 1324b(a) of IRCA provides in pertinent part: "It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual . . . with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment . . . because of such individual's citizenship status." As a general rule, IRCA's antidiscrimination provisions are applicable only to claims of an employee (or prospective employee) seeking redress for the unlawful employment practices of her employer, and are not applicable to independent contractors. See, e.g., Sellaro v. Elektra, 3

OCAHO 495, at 15-16 (1993) (complainant had intended to be an independent contractor, not an employee, and therefore was not protected by IRCA).

This rule is consistent with adjudications involving other federal labor laws, and is applied in Title VII and ADEA[1] cases, upon which the development of IRCA has placed significant reliance. See, e.g., U.S. v. General Dynamics Corp., 3 OCAHO 517, at 27 (1993) (Title VII and ADEA principles of law generally applied to § 1324b cases); Frankel v. Bally, Inc., 987 F.2d 86, 88-89 (2d Cir. 1993) (ADEA does not cover independent contractors); Mangram v. General Motors Corp., 1997 WL 97070, at *2 (March 6, 1997, 4th Cir.) (ADEA only covers an employee); Matthews v. New York Life Ins. Co., 780 F. Supp. 1019, 1023 (S.D.N.Y. 1992) (Title VII does not cover independent contractors); Krijn v. Simone, 752 F. Supp. 102, 104 (S.D.N.Y. 1990), aff'd, 930 F.2d 910 (2d Cir. 1991) (same); Knight v. United Farm Bureau Mut. Ins. Co., 950 F.2d 377, 380 (7th Cir. 1991) (same); N.L.R.B. v. United Ins. Co. of America, 390 U.S. 254, 256 (1968) (National Labor Relations Act excludes independent contractor from the definition of employee).

Neither section 1324b, that provision of IRCA which proscribes immigration-related discriminatory employment practices based on national origin and citizenship status, nor its implementing regulations define the term "employee" or "independent contractor." However, the regulations implementing IRCA's employment verification system, section 1324a, do provide definitions of those terms.

> The term "employee" means an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors as defined in paragraph (j) of this section . . .

The pertinent wording in paragraph (j) provides that:

> The term "independent contractor" includes individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results. Whether an individual or entity is an independent contractor, regardless of what the individual or entity calls itself, will be determined on a case-by-case basis. Factors to be considered include, but are not limited to, whether the individual or entity:
>
> [1] supplies the tools or materials;
> [2] makes services available to the general public;

[1] Title VII, 42 U.S.C. § 2000e et seq., and Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq.

> [3] works for a number of clients at the same time;
> [4] has an opportunity for profit or loss as a result of labor or services provided;
> [5] invests in the facilities for work;
> [6] directs the order or sequence in which the work is to be done; and
> [7] determines the hours during which the work is to be done.

See 8 C.F.R. § 274a.2(a)(f) and (j) (emphasis added).

Application of the foregoing definitions in section 1324b cases is consistent with IRCA's statutory scheme and was applied in part to resolve a similar issue of employee status in Sellaro, 3 OCAHO 495, at 16.

Therefore, whether an individual is an "employee," and thus entitled to protection under IRCA's antidiscrimination provisions, or an "independent contractor," and not entitled to such protection, must be determined in accordance with the definition of those terms as provided by IRCA, 8 C.F.R. § 274a.2(a)(f) and (j). Moreover, since the rule itself recognizes its limitations and provides that other factors may be used, other common law agency principles may be applicable. U.S. v. Robles, 2 OCAHO 309, at 8-9 (1991) (IRCA's definition of "independent contractor" is substantially the same as the one found in the Restatement (Second) of Agency, §220 (2) (1958)).

Examples of such common law factors being: the level of skill required in the particular occupation; the method of payment; whether the parties contemplate an employer-employee relationship; locality and/or industry practice; and whether the worker is in business for himself or herself. Robles, supra. While an analysis of the totality of the circumstances must be made, the greatest emphasis should be on the hiring party's right to control the manner and means by which the work is accomplished. Frankel, 987 F.2d at 90.

Given the foregoing analytical framework, consideration of respondent's first argument, to the effect that complainant was an independent contractor, is now in order.

In support of that argument, respondent has provided the January 15, 1997 sworn affidavit of Anthony Sages, the agency manager. Mr. Sages avers that Ms. Nwana was initially offered to begin association with the Equitable for a "pre-contract period," during the course of which Ms. Nwana was not required to terminate other employment relationships that may then have been in effect with other employers; that payroll taxes were not to be withheld from her sales agent's commissions; and that she was not to be covered by unemployment insurance nor workers' compensation coverages.

In addition, Ms. Nwana was required to prepare for and complete the licensing examinations needed to solicit life insurance and annuities, was to have participated in basic

training programs and courses, and was required to sell a minimum amount of business. After successfully completing the pre-contract period, she was to have been offered "an Equitable employee agent's agreement."

It is quite clear that the presentation of this evidence, without more, is insufficient to demonstrate an absence of genuine issues of material fact concerning complainant's employment status. Respondent has not provided any other probative evidence to support its factual contentions, and in light of those factors previously identified, a determination as to complainant's employment status, that of either having been an employee, as she contends, or that of having been an independent contractor, as Equitable urges, cannot be satisfactorily made at this time.

The facts as related in Mr. Sages' affidavit suggest that the pre-employment period contemplated the eventual establishment of a formal employment relationship, and that the complainant was therefore being regarded as a prospective employee. Moreover, the Equitable may have used the pre-employment period for recruitment purposes and, assuming that to be shown, discrimination practiced in the recruitment process is also proscribed, under the provisions of 1324b(a).

Respondent also asserts that complainant had been discharged solely for nondiscriminatory business reasons. More specifically, respondent contends that complainant, by having failed to successfully complete the pre-contract period requirements, was not offered an employment contract, Sages' affidavit, at ¶¶ 6-7. In rebuttal, complainant contends that she was discharged because she had not lived and worked in the United States for at least five years, see complainant's affidavit sworn to on July 19, 1996, at ¶10, and that other similarly situated employees were treated more favorably.

The role of the Administrative Law Judge is not "to second-guess an employer's business decision, but to look at evidence of discrimination." Yefremov v. NYC Dep't of Transportation, 3 OCAHO 562, at 45, n.15 (1993). If there is no evidence of unlawful discrimination, an employer's decision to terminate an employee shall not be disturbed. The current record, consisting of the parties' countering affidavits, is insufficient to make conclusive findings on these disputed facts as well.

Order

In view of the foregoing, respondent's Motion to Dismiss dated January 27, 1997 is granted only with respect to that portion of complainant's November 12, 1996 Complaint alleging discrimination based upon her Nigerian national origin, and that claim is hereby ordered to be and is dismissed with prejudice.

Because genuine issues of material fact remain in dispute regarding complainant's citizenship status claim, that portion of respondent's Motion to Dismiss concerning that claim is denied.

We will proceed in the following manner. As noted earlier, an Order of Inquiry will be directed to Ms. Nwana shortly in order to determine whether she is a "protected individual." Following the timely receipt of her replies to the questions propounded in that Order, the parties will be advised if any further activities will be in order.

Joseph E. McGuire
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June, 1997, I have served copies of the foregoing Order Granting in Part and Denying in Part Respondent's Motion to Dismiss to the following persons at the addresses shown, in the manner indicated:

Office of Chief Administrative Hearing Officer
Skyline Tower Building
5107 Leesburg Pike, Suite 2519
Falls Church, Virginia 22041
(original hand delivered)

James Angus, Esquire
Office of Special Counsel for Immigration
Related Unfair Employment Practices
P.O. Box 27728
Washington, D.C. 20038-7728
(one copy sent via regular mail)

Jean Larosiliere, Esquire
22 Homestead Way
Rockaway, New Jersey 07866
(one copy sent via regular mail)

Jill Rafaloff, Esquire
1290 Avenue of the Americas
12th Floor
New York, New York 10104
(one copy sent via regular mail)

Laurence C. Fauth
Law Clerk to
Joseph E. McGuire
Administrative Law Judge
Department of Justice
Office of the Chief Administrative
Hearing Officer
5107 Leesburg Pike, Suite 1905
Falls Church, Virginia 22041
(703) 305-1043